

## **GENERAL CONDITIONS FOR CONSULTANT CONTRACTS**

### **SECTION 1 - CONTRACT INTERPRETATION**

#### **Scope of Section**

This Section consists of abbreviations, definitions, and general rules of interpretation.

#### **1.1 ABBREVIATIONS**

Abbreviations are defined in the following list. Abbreviations not defined in this Section or otherwise in the Project Contract shall have the meaning that is commonly accepted in the engineering and construction industry.

AASHTO	American Association of State Highway and Transportation Officials
CFR	Code of Federal Regulations
DBE	Disadvantaged Business Enterprise
EEO	Equal Employment Opportunity
FAA	Federal Aviation Administration
FHWA	Federal Highway Administration
FRA	Federal Railroad Administration
FTA	Federal Transit Administration
MEDOT	Maine Department of Transportation
MRSA	Maine Revised Statutes Annotated
MUTCD	Manual on Uniform Traffic Control Devices
NEPA	National Environmental Policy Act
OSHA	Occupational Safety and Health Administration
PIN	Project Identification Number
P.L.	Public Law
USC	United States Code

#### **1.2 DEFINITIONS**

Words, terms, or phrases are defined below. These definitions are applicable to both the singular and plural thereof. Words, terms, or phrases that are not defined in this section or in the General Consultant Agreement or Project Contract shall be given their plain meaning.

**23 CFR Part 172.** Title 23 Code of Federal Regulations, Part 172, Administration of Engineering and Design Related Service Contracts.

**Additional Services.** The Services to be performed for or furnished to the Department by a Consultant in accordance with a General Consultant Agreement or a Project Contract.

**Agreement/Contract Modification.** A bilateral agreement of both parties to the General Consultant Agreement or Project Contract which modifies the terms or conditions of the General Consultant Agreement or Project Contract.

**As-Built Drawings.** The drawings as issued for construction on which the construction contractor upon completion of the work has shown changes due to contract modifications (Change Orders and Supplemental Agreements), actual site conditions, and other information which Department considers to be significant.

**BAFO.** Best and Final Offer.

**Brooks Act.** Public Law 92-582, the law which establishes Federally mandated procedures for the quality based acquisition of consultant services.

**Bureau/Office.** A subdivision of the Department charged with the development of capital improvement projects.

**Consultant.** An individual or firm under contract with the Department that is bound by the Consultant General Conditions to perform services related to engineering, planning, data gathering, environmental, design, construction and maintenance of roads, bridges and other transportation facilities within Maine.

**Contract:** A written document between the transportation agency (Department) and the consultant that sets forth the obligations of the parties thereunder for the performance of the prescribed work.

**Cost Per Unit of Work:** A set rate to be charged on a project for each unit of work completed. This method of payment should be utilized when the work per unit can be determined in advance with reasonable accuracy, but the extent of the work is indefinite.

**Cost Plus Fixed Fee.** The actual cost incurred by the Consultant which are supported by records, including salaries, overhead, and direct expenses plus a fixed amount of fee to be paid to the Consultant upon completion of specific amounts or units of work or proportional to completion of a project. The fixed fee shall not increase unless there is a change in the scope of work approved by the Department.

**Deliverables.** A thing of value that a Consultant delivers to the Department in exchange for consideration from the Department pursuant to the terms of a General Consultant Agreement or a Project Contract.

**Department.** Maine Department of Transportation.

**Direct Expenses.** Expenses such as telephone, tolls, reproduction costs, per diem (requires overnight stay) and other approved subconsultant(s) costs billed at actual cost. Those direct expenses as defined in 48 CFR Part 31. The reimbursable costs for per diem (lodging and meals) shall not exceed that allowed by the Department's Administrative Policy Memorandum No. 191. Mileage shall be paid at the current amount allowed by the State of Maine, Title 5, M.R.S.A. §1541. Reproduction of plans for submittal to the Department shall be charged at actual costs. Any reproduction costs incurred for the Consultant's internal use is considered overhead expenses and not chargeable as a direct expense.

**Director.** An individual designated as the head of a Bureau or office.

**Effective Date of General Consultant Agreement or Project Contract.** The date indicated in the Agreement or Contract on which it becomes effective, but if no such effective date is indicated, it means the date on which the Agreement or Contract is signed by the last of the two parties to sign.

**FAA.** Federal Aviation Administration.

**FHWA.** Federal Highway Administration.

**FRA.** Federal Railroad Administration.

**FTA.** Federal Transit Administration.

**Final Audit.** The audit performed by the Department after the expiration of a contract.

**General Conditions.** General terms, conditions, and procedures that govern the work to be performed or furnished by Consultant with respect to any Project. General Conditions normally apply to all contracts of the issuing agency. These are differentiated from Special Provisions which would only apply to an individual contract for a specific to a type of work.

**General Consultant Agreement (GCA).** A multi-year agreement between the Department and the Consultant setting forth a specific period of time under which future Project Contracts may be negotiated without repeating the selection process. GCA's do not obligate money, but do require as a minimum, a duration, type of services being provided and maximum overall amount or cost limit. GCA's shall also note the maximum amount of any Project Contract negotiated under the GCA. GCA's require an unencumbered number from the State of Maine Bureau of Purchases for fund tracking purposes. A GCA may or may not include all the terms and conditions for all subsequent Project Contracts negotiated under the multi-year General Consultant Agreement. A GCA is similar in many respects to a Federal Indefinite Quantity/Indefinite Delivery (IDIQ) Contract.

**Hourly Rate.** The negotiated hourly rate accepted by the Department for performance of work for the duration of the Contract as outlined in said Contract.

**Laws and Regulations; Laws or Regulations.** Any and all applicable laws, rules, regulations, ordinances, codes, standards, and orders of any and all governmental bodies, agencies, authorities, and courts having jurisdiction.

**Lump Sum.** A set amount for reimbursement, which includes all salaries, overhead, profit, and other expenses established in the Project Contract. Once a Lump Sum amount is agreed upon, the goods or services must be provided regardless of the actual cost to the consultant. A Lump Sum amount cannot be changed once the Project Contract is signed, unless there is a change in the scope of work, whereby a modification to the Project Contract may be executed, or the government estimate contained a material error. In accordance with 23 CFR Part 172.5(c) lump sum agreements are subject to a prenegotiation audit.

**Maximum Amount.** The sum of the costs of all services and other charges that the Department is obligated to pay a Consultant pursuant to a General Consultant Agreement or Project Contract.

**Prenegotiation Audit.** An examination of a consultant's records made in accordance with generally accepted auditing standards. Such audit is required for consultant contracts which obligate in excess of \$250,000 and shall take place prior to the award of a contract.

**Project.** Any unit of work or study for which a consultant selection is made and a Contract entered into.

**Project Contract.** A binding agreement between the Department and the Consultant relating to a specific task or project with a defined scope of work and compensation negotiated pursuant to the Consultant General Conditions. Consultant Project Contracts can be stand-a-lone or negotiated under the umbrella of a general multi-year General Consultant Agreement (GCA).

**Project Manager:** An employee of the Department designated to oversee the performance of a consultant performing contracted services on a project. Individual assigned the responsibility for managing project scope, budget, and schedule.

**Proposal.** An offer as part of a negotiation made by a consultant to the Department in reply to a Request For Proposal (RFP) which forms the technical and price basis when entering into a mutually binding contract. (Refer to 48 CFR Chapter One Part 2.101 definitions)

**Provisional Overhead Rate.** The amount of compensation due to a Consultant that is subject to permanent adjustment as a result of final audit by the Department.

**Rates.** The rate paid a Consultant for performance of work.

**Request for Proposal.** The Departmental request to a consultant or group of consultants for accomplishment of a specific Scope of Work. The consultant response shall be in the form of a technical and price proposal in the format required by the Department. (See Proposal)

**Request for Qualifications.** The Departmental request to the consultant community requesting an outline of the firm's ability to provide consultant and professional services in a particular area of need, discipline or disciplines. More than one consultant may be selected from a process involving only one RFQ. The Department shall use the responses from an RFQ to develop a slate or short list of consultants for interview.

**Scope of Services or Scope of Work** (a) Preliminary: A general description of the work to be accomplished including the location of the project. (b) Detailed: A clear, accurate, and detailed description of the technical requirements for the services to be rendered.

The detailed Scope of Services describes for the consultant what work will be required, the conditions under which the work must be conducted, how achievements will be assessed, and what obligations of both the consultant and the agency (Department) will be. It enables the consultant to assess its capabilities in light of the contract requirements.

**Special Provision.** A provision unique to an agreement or contract which supersedes any inconsistent or conflicting clause in the Consultant General Conditions. Special Provisions shall be identified in the General Consultant Agreement or Project Contract.

**Specific Rates of Compensation.** A set rate to be charged on the project for each hour of work completed. The negotiated rate typically consists of an hourly rate, overhead, and a profit. Direct expenses would be in addition to the specific rate.

**Specifications.** That part of the Contract Documents consisting of written technical descriptions of materials, equipment, systems, standards, and workmanship as applied to the work and certain administrative details applicable thereto.

**Subconsultant.** Individual or entity having a contract with Consultant to furnish services with respect to this Project as Consultant's independent professional associate, consultant, subcontractor, or vendor.

**Substantial Completion.** The time at which the work (or a specified portion thereof) has progressed to the point as determined by the Department is sufficiently complete to be utilized for the purpose for which it is intended.

### 1.3 GENERAL RULES OF INTERPRETATION

#### 1.3.1 Referenced Publications

The Consultant is responsible for obtaining all manuals, specifications, reference guides, or other publications referenced or indicated by the General Consultant Agreement (GCA), Project Contract (PC), or these Consultant General Conditions and performing the work in conformity with the same. Unless a specific date or version is specified, the Consultant shall use the most recent version of such publication that existed at the time the Project Contract was executed.

#### 1.3.2 Headings and Tables of Contents

All headings, titles, and tables of contents are for convenience only. They do not control interpretation and do not relieve the parties of the obligation to read these Consultant General Conditions as a whole.

#### 1.3.3 Priority of Conflicting Contract Documents

If the Consultant discovers any ambiguity, error, omission, conflict, or discrepancy ("ambiguity, etc.") related to the Contract Documents that may significantly affect the cost, quality, conformity, or timeliness of the work, the Consultant must notify the Department. In the case of ambiguity, etc., the Parties agree that the following components of the Contract Documents shall control in the following descending order of priority:

- Modifications to Project Contract
- Project Contract and Appendices
- Modifications to General Consultant Agreement
- General Consultant Agreement and Appendices
- Consultant General Conditions

## SECTION 2 – GENERAL CONSULTANT AGREEMENT

### 2.1 PURPOSE

General Consultant Agreements (GCA's) are ordering agreements which provide for an indefinite quantity of consultant services for which the extent or exact nature is not determined. GCA's are typically limited by "upset" or maximum total value ordered amounts and cover a specific period of time.

#### 2.1.1 Financial Package Preparation and Evaluation

At the time a Consultant enters into a GCA with the Department, said Consultant shall prepare a financial package to be submitted in duplicate to the Contracts Section which will forward one copy to the Office of Audit for evaluation. This financial package must be submitted to the Department on an annual basis.

The financial package should include the following items, as described:

- (1) The Selection Committee may require the Consultant to furnish its financial statements for the immediate preceding accounting year as audited by a licensed independent public accountant in accordance with generally accepted auditing standards adopted by the American Institute of Certified Public Accountants (AICPA). Any management letters prepared by the licensed independent public accountant as part of the audit should be included.
- (2) An audit report on the consultant's overhead for the preceding accounting year prepared by a licensed independent public accountant based on an audit made in accordance with (1) Government Auditing Standards issued by the U.S. Comptroller General and (2) the cost principles of Part 31 of the Federal Acquisition Regulations (48 CFR). The audit report is required for consideration of contract and subcontract awards in excess of \$100,000. This requirement does not apply to consultants who have not completed their first accounting year. The report should include:
  - (a) The auditor's opinion on the overhead and a detailed overhead schedule for which the audit opinion is given, including the overhead rates and the base upon which the rate is applied. The rate for home office overhead should be included and a separate field overhead rate should also be included if field operations are an offered client service or if the consultant has been selected for a discipline involving field services.
  - (b) The auditor's opinion on the ability of the accounting system to accumulate, allocate, and segregate direct and indirect costs.

After the selection committee recommendation on the selected consultant, the Office of Audit will evaluate Items 1 and 2 in the package and advise the Contracts Section as to its adequacy, based on the data provided:

- (1) When financial statements are included in the financial package, describe any concerns regarding the financial capabilities of the consultant.

- (2) Whether the overhead audit is acceptable as a basis for utilizing the overhead rates in contract negotiations or if the audit is not acceptable, the Office of Audit will describe the efforts necessary to obtain an acceptable overhead rate.
- (3) Whether in the auditor's opinion the accounting system of the consultant has the ability to accumulate, allocate, and segregate allowable direct and indirect costs for billing purposes.

A prenegotiation audit is required for contracts and contract modifications in excess of \$250,000.00. In addition, lump sum agreements are subject to a prenegotiation audit in accordance with 23 CFR Part 172.5(c).

### SECTION 3 –NEGOTIATION OF PROJECT CONTRACTS

#### 3.1 THE PROJECT

##### 3.1.1 Project Contracts/The Process

As needs develop, the Department shall assign specific tasks to the Consultant according to a specific task or project, hereinafter called the "Project Contract (PC)." The Project Contract shall include: project description, purpose and need, scope of work, project status, list of team members, materials and services to be supplied by the Department, and proposed schedule of milestones and budget.

After the turnover of material by mail or pickup from the Department and receipt of a Request for Proposal for a specific scope of work, the Consultant shall prepare a preliminary detailed scope of work and schedule for distribution and discussion at an initial team meeting and site visit to be scheduled by the Department, as appropriate, which shall be held to develop team relationships and responsibilities. After agreement of the team members on the responsibilities, scope and schedule, the Consultant shall respond by submitting to the Department a technical proposal, list of items required from the Department, detailed price proposal, including any subconsultant work, and project schedule.

When all elements of the proposed work have been approved and after execution of the Project Contract, the Department shall issue a written "Notice to Proceed" indicating to the Consultant that work may commence.

##### 3.1.2 Solicitation by the Department

The Contracts Section shall advise the consultants of their selection to enter into a General Consultant Agreement with the Department and the individual lead units shall provide the consultant(s) with a Request for Proposal (RFP) and sufficient information to develop detailed technical and price proposals.

##### 3.1.3 Proposal by the Consultant

In response to an RFP, the selected consultant shall prepare and submit a technical proposal demonstrating the consultant's understanding of the proposed work and detailing the consultant's approach to the work. The Consultant shall be allowed sufficient time to prepare a proposal as determined by the Selection Committee and based on the Department's Scope of Work as outlined in the Request for Proposal. Technical proposals and price proposals shall be prepared in accordance with the

State of Maine, Department of Transportation, Consultant Procedures. Price proposal elements should be provided for each corresponding technical proposal task and include:

- (a) Direct labor expenses for each classification of labor.
- (b) Overhead rates.
- (c) Itemized direct nonsalary expenses.
- (d) Fixed-fee/Profit.
- (e) Total proposed price.

Price proposals for major location and environmental studies, design of major bridge and/or highway projects estimated to exceed \$1,000,000.00 contract cost (estimated construction cost over \$10,000,000) shall be submitted only after the scope of work has been determined.

Lump Sum proposals shall include a set amount for reimbursement, which includes all salaries, overhead, profit, and other expenses necessary to complete the work to the satisfaction of the Department. The Department shall review the submitted materials, and enter into negotiations with the Consultant.

#### 3.1.4 Negotiation

Prior to receipt of the Consultant's proposal, the Department shall prepare an independent estimate for the desired services. This shall be the basis for ensuring that the desired services are obtained at a fair and reasonable cost. During negotiations, the Department and the Consultant shall discuss the scope of work under the Project Contract to eliminate any misunderstandings. The objective is to reach a complete and mutual understanding of the detailed scope and cost of services to be provided.

#### 3.1.5 Best and Final Offer

If the Department and the Consultant cannot agree on an acceptable level of effort and price to perform the work, the Department shall request a Best and Final Offer (BAFO). If the BAFO is unacceptable, then the negotiation should be terminated, and the Department should initiate negotiations with the next most qualified selected Consultant.

### 3.2 EXECUTION OF CONTRACT BY DEPARTMENT

The Commissioner or the Commissioner's authorized agent shall execute the Contract within fourteen (14) days of receipt of a signed contract from the Consultant. After execution by the Department and after a contract number has been assigned, an original executed Contract shall be returned to the Consultant for their file.



## SECTION 4 - GENERAL RIGHTS AND RESPONSIBILITIES

### 4.1 GENERAL

#### 4.1.1 Joint Covenants of Good Faith and Fairness

The GCA and/or PC imposes an obligation of good faith and fair dealing on both parties in the execution, performance, interpretation, and enforcement of the Agreement or Contract. With a positive commitment to honesty and integrity, the Consultant and the Department agree to function within all applicable laws, statutes, regulations, and Consultant General Conditions, GCA and/or PC provisions; avoid hindering each other's performance; fulfill all obligations diligently; and cooperate in achievement of the intent of the GCA and/or PC.

#### 4.1.2 Representations by Consultant

By signing the GCA and/or a Project Contract(s), the signatory represents that he/she is a duly authorized representative of the Consultant firm and represents that neither he/she nor the Consultant firm has (a) employed or retained for a commission, percentage, brokerage, contingent fee, or other consideration, any firm or person (other than a bona fide employee working solely for the Consultant) to solicit or secure the GCA and related contracts; (b) agreed, as an express or implied condition for obtaining this contract, to employ or retain the services of any firm or person in connection with carrying out the contract, or; (c) paid, or agreed to pay, to any firm, organization, or person (other than a bona fide employee working solely for the Consultant) any fee, contribution, donation, or consideration of any kind for, or in connection with, procuring or carrying out the GCA, PC and any related contracts.

By signing the GCA and/or a Project Contract, the Consultant and subconsultant(s) represent that they have made and shall continue to make a good faith effort to comply with all applicable federal and state requirements on equal employment opportunity, nondiscrimination and affirmative action.

By signing the GCA and/or a Project Contract, the Consultant certifies to the best of its knowledge and belief, that it and its principals: (a) are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency; (b) have not within a 3-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property; (c) are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph (b) of this certification; and (d) have not within a 3-year period preceding this application/proposal had one or more public transactions (Federal, State or local) terminated for cause or default.

If the Consultant is unable to certify to any of the statements in this section, such Consultant shall submit an explanation to the Project Manager, or his/her designee, prior to submitting a proposal or entering into a GCA and/or Project Contract with the Department.

#### 4.1.3 Representation by Department

By executing the GCA and/or Project Contract, the Department's Director of the applicable Bureau or Office or other authorized agent for the Department represents that, to the best of his/her knowledge, the Consultant firm or its representative has not been required, directly or indirectly, as an express or implied condition in connection with obtaining or carrying out the GCA and/or Project Contracts to (a) employ or retain, or agree to employ or retain any firm or person, or (b) pay or agree to pay any firm, person or organization any fee, contribution, donation, or consideration of any kind.

### 4.2 DEPARTMENT'S GENERAL AUTHORITY AND RESPONSIBILITIES

#### 4.2.1 No Personal Liability

The Department's employees and other representatives act solely as representatives of the Department when conducting and exercising authority granted to them under the GCA and/or PC. Such persons have no liability either personally or as Department employees.

#### 4.2.2 Inform Consultant about Project Requirements

The Department shall provide all foreseeably relevant criteria and information pertaining to Department's requirements for the Project which may include the following:

- A. Property descriptions.
- B. Zoning, deed and other land use restrictions.
- C. Property, boundary, easement, right-of-way and other special surveys or data.
- D. Planning Studies.
- E. Explorations of subsurface conditions, drawings of physical conditions, hydrographic surveys at or contiguous to the site.
- F. Environmental Assessments and other relevant environmental or cultural studies.
- G. Data or consultations as required for the Project.

#### 4.2.3 Accuracy

The Consultant may reasonably rely upon the accuracy of data furnished by Department to Consultant pursuant to the GCA and/or PC. Consultant may use such requirements, reports, data, and information in performing or furnishing services under the GCA and/or PC. The Consultant shall not take advantage of any ambiguity, error, omission, conflict, or discrepancy regarding the data provided by the Department, but report such ambiguity, error, omission, conflict, or discrepancy to the Department's appropriate contract administrator.

#### 4.2.4 Advise Consultant of Services of Other Consultants

The Department shall advise the Consultant of the identity and scope of services of any independent consultants employed by Department to perform or furnish services in regard to the Project.

## 4.3 CONSULTANT'S GENERAL AUTHORITY AND RESPONSIBILITIES

### 4.3.1 Redesign Responsibility for Defective Work

The Consultant must correct, at no cost to the Department, any designs, drawings, specifications, or other items or services furnished by the Consultant to the Department or its representative that are defective or not in compliance with the terms hereof as determined by the Department.

### 4.3.2 Interpretation and Interpolation

The Consultant is responsible for all interpretations and interpolations made from information provided in the Contract Documents, including, but not limited to, data and test results related to location, survey, hydrology, hydraulics, soils, ledge quality, existing structures, and geotechnical information.

### 4.3.3 Project Records

All technical project records, whether printed or electronic, made by the Consultant and subconsultant(s), if applicable, or furnished to the Consultant by the Department shall, upon completion of the work contemplated under the GCA/PC, be filed with the Department. The Consultant and subconsultant(s), if applicable, shall maintain all books, documents, papers, accounting records and other evidence pertaining to cost incurred under the GCA and/or PC and shall make such materials available at their respective offices at all reasonable times during the GCA and/or PC period and for three years from the date of final payment under the GCA and/or PC. The Consultant and subconsultant(s), if applicable, shall allow inspection of pertinent documents by the Department or any authorized representative of the State of Maine or Federal Government, and shall furnish copies thereof, if requested.

The Consultant shall maintain a correspondence file which shall contain documentation of project progress as well as dates of all meetings, plan submissions, agreements, etc. with agencies or persons other than those of the Consultant.

### 4.3.4 Ownership of Documents

- A. The Department acknowledges the Consultant's plans and specifications as instruments of professional service.
- B. All original data furnished to the Consultant by the Department shall be returned to the Department in good order.
- C. All plans, specifications and exhibits prepared or obtained under the terms of the GCA/PC shall be delivered to and become the sole property of the Department upon completion of the work. Consultant shall be entitled to maintain a copy of all such documents for its business files for a period of three (3) years.
- D. If the Department alters the Consultant's plans, specifications, and/or exhibits or uses said plans, specifications, and/or exhibits for purposes other than their original intended use, the Consultant shall not be held liable.

## 4.4 COMMUNICATION AND COORDINATION

### 4.4.1 Utility Coordination

The Consultant shall make every reasonable effort to minimize the impact to existing utilities and also minimize lengths of relocated or proposed additional utilities.

## 4.5 SUBCONSULTING

### 4.5.1 Subcontractors and Outside Associates and Consultants.

Any subcontractors, specialty firms, outside associates or consultants retained by the Consultant in connection with the services covered by the contract shall be limited to individuals or firms that were specifically identified in the Project Contract. The Consultant shall obtain the Department Project Manager, or his/her designee's, written consent before making any substitution for these subcontractors, associates, or consultants.

### 4.5.2 Consultant's Duties Regarding Subconsultant(s)

The Consultant is responsible for assuring that its subconsultant(s) has sufficient skill and experience to perform the work properly and for coordinating and managing its subconsultant(s) to achieve the intent of the Contract. Except as provided otherwise in the Contract, the Consultant waives all claims arising from failure to coordinate and manage its subconsultant(s) and indemnifies and holds harmless the Department from any such claims. Subconsulting does not alter the Consultant's obligations under a Project Contract.

### 4.5.3 Flow Down

All subcontracts of the Consultant, and all lower tier subcontracts, shall contain or reference all applicable provisions of the Contract, including all safety, wage, prompt payment, labor, environmental, insurance, and equal opportunity provisions. The Consultant shall indemnify and hold harmless the Department against any and all claims or liabilities arising from the failure to include such flow down provisions and against damages caused by subconsultant(s).

### 4.5.4 No Third Party Beneficiaries

The Consultant and the Department agree that the GCA and/or Project Contract are not intended to create any third-party beneficiaries or to authorize anyone not a party to the GCA or PC to maintain an action under said GCA or PC provisions.

## SECTION 5 - GENERAL SCOPE OF WORK

The Project Contract is Federally funded, unless expressly provided otherwise in the Contract Documents. As a Federally funded Contract, it includes all Federal requirements set forth in Appendix A of these Consultant General Conditions.

### 5.1 DESIGN STANDARDS

All design work shall conform to the current editions of the following publications, including, but not limited to:

#### 5.1.1 Maine Department of Transportation

- a. Standard Details and Supplemental Standard Details
- b. Standard Specifications with Interim Specifications
- c. Outline of the Department's latest Project Development Process
- d. CADD Standards
- e. Bridge Design Manual
- f. Highway Design Guide
- g. Survey Manual
- h. MEDOT Right-of-way Policies and Procedures
- i. MEDOT Utilities Policies and Procedures
- j. MEDOT Construction Manual
- k. MEDOT Metric Conversion Plan
- l. MEDOT Best Management Practices for Erosion and Sediment Control
- m. MEDOT Format for Bridge Soils Reports
- n. MEDOT Format for Highway Soils Reports

#### 5.1.2 AASHTO

- a. A Policy on Geometric Design of Highways and Streets
- b. LRFD Bridge Design Standards with Interim Specifications
- b. Standard Specifications for Highway Bridges with Interim Specifications
- c. Other Applicable AASHTO Standards and Guide Specifications

#### 5.1.3 Highway Research Board

- a. Highway Capacity Manual, SR 209

#### 5.1.4 U.S. Department of Transportation

- a. Pertinent Federal-Aid Policy Guides
- b. Rules and Regulations, Federal Highway Administration
- c. Manual on Uniform Traffic Control Devices for Streets and Highways
- d. Roadside Design Guide
- e. American Railway Engineering and Maintenance Association (AREMA) Manual
- f. FHWA Right-of-Way Project Development Guide

Exceptions to design standards must be made by the Department in writing.

### 5.1.5 Accuracy

Consultant shall be responsible for the accuracy of the services it renders and information it generates, including its subconsultant(s) in accordance with the standard of care set forth in Section 6.1 below. Department shall not be responsible for discovering deficiencies therein. Consultant shall correct such deficiencies without additional compensation except to the extent such action is directly attributable to deficiencies in Department-furnished information.

### 5.1.6 Endorsed and Sealed

All plans, specifications, estimates, and data prepared by the Consultant shall be endorsed and sealed with a State of Maine seal by the Consultant's Licensed Professional Engineer, Landscape Architect, Geologist, Site Evaluator, Surveyor, Soil Scientist, Master Plumber or other professional, as applicable under Maine State Law.

## 5.2 ELECTRONIC EXCHANGE OF CADD DATA

The Consultant must follow the most recent version of the Department's specification for required electronic (computer) data, at the time of Project Contract execution, as it relates to engineering design project deliverables in effect. Consultants wishing to perform professional engineering services for MEDOT are required to deliver electronic data as specified in said document. The specification also requires consultants to accept and utilize pertinent electronic input data as provided by MEDOT. It is the responsibility of the Consultant to translate this data into other formats required for use in their design software. A copy of this specification may be obtained from the Project Manager, or his/her designee.

## 5.3 HISTORIC AND ARCHEOLOGICAL CONSIDERATIONS

Unless expressly provided otherwise by the Contract, the Maine State Historic Preservation Office has determined that the Project shall have no effect upon any site of historic or archaeological significance, as identified by the National Historic Preservation Act of 1966 and the Archaeological and Historic Preservation Act of 1974.

If the Consultant discovers any object of potential archaeological, paleontologic, or other historic interest, all work that could disturb said object shall immediately cease and shall not be resumed until an investigation of the object and related deposits have been completed and the removal of articles of interest has been accomplished. Should such a deposit be discovered, the Consultant shall notify the Department immediately. The first indication of archaeological deposits may be the burial grounds or campsites of Native Americans that reveal the bones of the dead and the people's implements. The first indications of paleontologic deposits may be the exposure of marine fossils or shells found mainly in clay deposits. Indications of deposits of more recent historic interest may be the exposure of dumps in landfill areas, abandoned campfire sites, and building foundations.

The Consultant is hereby notified of a Maine statute, 27 MRSA §371, which States that artifacts, specimens, and material which are public property by virtue of having been found on, in, or beneath State controlled lands, and places Ownership of the same in the State of Maine.

## 5.4 EQUAL OPPORTUNITY & CIVIL RIGHTS

### 5.4.1 Requirements Applicable to Federally Funded Contracts

Projects shall be considered Federally funded unless the GCA and/or PC state otherwise. By signing the GCA and/or PC, the Consultant certifies to all of the provisions contained in Appendix A – Federal Contract Provisions Supplement which is made a part of these General Conditions with the exception that the word “Consultant” should be substituted for the word “Contractor.” This Appendix contains provisions that are required in all Federally funded contracts. Unless expressly otherwise provided, the Consultant must comply with all provisions contained in said Appendix A.

### 5.4.2 DBE Compliance

The Consultant shall ensure that Disadvantaged Business Enterprises (DBE's), as defined, have the maximum opportunity to participate in the performance of the GCA and/or PC. In this regard, the Consultant shall analyze documented efforts to incorporate Disadvantaged MEDOT certified firms into the Department's federally funded programs. The Department has established an annual aspirational effort for DBE utilization. This annual aspirational effort shall be specified in the Project Contract.

If, upon analysis of documented efforts, the Department determines that the annual aspirational level is not being met, then the Department may establish specific contractual goals which would be announced in the Request for Proposal.

The Consultant shall check with the Department's Civil Rights Coordinator to confirm that the business enterprise it plans to utilize as a DBE has valid, current DBE certification, or has certification pending and that the business enterprise shall be DBE certified by the time the Consultant receives the written “Notice to Proceed” with the project.

The Consultant shall not perform within its own organization, or assign to any other business, activity designated for the DBE's without the written consent from the DBE and the Department. Any action taken by the Consultant in regards to this section shall be approved by the Department.

The Consultant shall verify and demonstrate a good faith effort with DBE goals by submitting to the Department a Proposed Utilization Plan, “Quarterly Reports”, and “Final Goal Verification” forms in accordance with the commitments made for each project.

## SECTION 6 - QUALITY

### 6.1 STANDARD OF CARE / CORRECTION OF ERRORS

The Consultant agrees to perform all work arising out of the GCA and/or PC in a reasonable and prudent manner not below the acceptable standard of care in the Consultant's profession or occupation. The Consultant agrees to perform such additional work as may be necessary to correct any negligence, errors, or omissions due to any fault or negligence of consultant and subconsultant(s) in all work required under the GCA and/or PC without undue delay and without additional cost to the Department.

### 6.2 RESPONSIBILITY OF CONSULTANT

(a) The Consultant shall be responsible for the professional quality, technical accuracy, and the coordination of all documents, designs, drawings, specifications, and other services furnished by the Consultant and subconsultant(s) under a Project Contract.

(b) Neither the Department's review, approval or acceptance of, nor payment for, the services required under a Project Contract shall be construed to operate as a waiver of any rights under a Project Contract or of any cause of action arising out of the performance of a Project Contract, and the Consultant shall be and remain liable to the Department in accordance with applicable law for all damages for which the Department may become liable, including but not limited to, personal injury, including death, and third party property damage caused by the Consultant and subconsultant's negligent performance of any of the services furnished under a Project Contract.

(c) The rights and remedies of the Department provided for under the Project Contract are in addition to any other rights and remedies provided by law.

#### 6.2.1 Hazardous Environmental Condition

The Department shall give prompt written notice whenever the Department observes or otherwise becomes aware of a Hazardous Environmental Condition that affects the Project.

If a Consultant or subconsultant(s) suspects that a Hazardous Environmental Condition exists, Consultant or subconsultant(s) shall notify Department and, to the extent of applicable Laws and Regulations, appropriate governmental officials. This notice requirement does not create a duty or obligation for Consultant to discover any such condition unless that duty is established by the Project Contract.

Final design of projects is contingent upon the funding of the project for construction. Written Notice to Proceed with the final design or cancellation of final design shall occur within seven (7) months of the approval of the Preliminary Design Report by the Department.



### 6.3 REQUIREMENTS FOR REGISTRATION OF DESIGNERS

Design of services under a Project Contract regulated by Maine State Law shall be done or reviewed, approved and stamped by an employee of Consultant or subconsultant(s) who performed or supervised preparation of same and who has the appropriate registration or license (e.g., Engineer, Landscape Architect, Geologist, Site Evaluator, Surveyor, Soil Scientist, Master Plumber or other professional) legally governing the scope of services in the Project Contract.

## SECTION 7 - TIME

### Scope of Section

This Section contains general time-related provisions of the Contract including the Contract Time, allowable work times, schedule requirements, and Project Closeout.

### 7.1 SCHEDULE OF WORK

The Consultant shall perform its work in accordance with the schedule of work submitted with the Consultant's Proposal, but in any event, the Consultant's work shall be complete within the timeframes set forth in the Project Contract.

### 7.2 PROGRESS REPORTS

Prior to the start of work, the Consultant shall furnish to the Department a proposed progress schedule in the Department's standard format indicating the various phases of work which the Consultant shall complete to meet the completion date as set forth by the Department, monthly progress reports and a schedule demonstrating current status of each major task. The progress report shall be used to keep team members and the Contract Administrator informed about status and issues. A work chart shall also be furnished so that progress may be shown graphically. The Consultant shall submit a Monthly Project Status Report to the Department.

### 7.3 EXTENSIONS

If during the process of the work it is necessary to change or extend a date because of circumstances beyond the Consultant's control, then a request in writing shall be made to the Department within 10 days of when the Consultant realized a change or extension was required by the consultant for such a change or extension and for additional compensation as mutually agreed upon by the Department and Consultant, setting forth the reasons for the request.

### 7.4 LATE DELIVERY

If the Consultant fails to perform work within the timeframes indicated in the Project Contract, including any preapproved time extensions by the Department, for reasons unrelated to performance by the Department, and the Department reasonably determines that such failure causes a financial impact on the Department, such failure shall be recorded and used as part of the Department's selection process for future projects.

## SECTION 8 - PAYMENT

### Scope of Section

This Section contains general provisions related directly to payment and other payment-related terms.

#### 8.1 GENERAL PAYMENT PROVISIONS

The allowability of individual items of cost used by the Consultant to establish a total cost shall be determined by the Department under the cost principles and procedures set forth in the current revision of 48 CFR, Chapter I (Federal Acquisition Regulations). The Consultant must submit a breakdown of its costs to include as a minimum items listed in Section 8.1.1 - 8.1.6.

The work required under the GCA and/or Project Contract shall be paid in accordance with the following stipulations:

##### 8.1.1 General Fee

Payments to the Consultant shall be full compensation for furnishing all labor, equipment, materials, services, incidentals, profit and direct expenses used to perform all work under the PC in a complete and acceptable manner, and for all risk, loss, damage, or expense of any kind arising from the nature or prosecution of the work. If using cost plus fixed fee, the maximum amount shall also include a negotiated amount for fixed-fee/profit. No payments shall be made for work, expenses or profit exceeding the maximum amount, except for additional services, to complete PC's and with appropriate Department approval.

##### 8.1.2 Rates

The Consultant shall submit with the PC a current listing of employees' names and their direct labor wage rates. If the cost plus fixed fee method of payment is utilized, the Consultant shall notify the Department of any changes in rates. The Department shall have the right to review salaries and increases prior to the submission of a monthly invoice by the Consultant. Unless the Department notifies the Consultant in writing during the following thirty-day (30) period that such salary or increase is, in its opinion, in question, the lack of notice shall constitute acceptance of the salary for invoicing purposes. If an hourly rate method of payment is utilized, the hourly rate negotiated at the time of Project Contract execution shall remain the same for the duration of the contract.

##### 8.1.3 Direct Expenses

Direct expenses as defined by 48 CFR Chapter 1, Part 31; such as telephone, tolls, reproduction costs, per diem and approved subconsultant(s) costs shall be billed at actual cost. The reimbursable costs for per diem (lodging which requires overnight stay and meals) shall not exceed that allowed by the Department's Administrative Policy Memorandum No. 191. Mileage shall be paid at the current amount allowed by the State of Maine, Title 5, M.R.S.A. §1541. Reproduction of plans for submittal to the Department shall be charged at actual costs. Any reproduction costs incurred for the Consultant's internal use is considered overhead expenses and not chargeable as a direct expense.

#### 8.1.4 Fixed Fee/Profit

The maximum fixed-fee/profit payable for work performed under the terms of the Project Contract shall vary according to the complexity of the assignment and the responsibilities assigned to the Consultant. The fixed-fee/profit shall not be increased for extra work under a Project Contract, unless a mutually agreed upon modification is entered into by the Department and the Consultant.

#### 8.1.5 Lump Sum

A set amount for reimbursement, which includes all salaries, overhead, profit, and other expenses established in the Project Contract. Once a Lump Sum amount is agreed upon, the goods or services must be provided regardless of the actual cost to the consultant. A Lump Sum amount cannot be changed once the Project Contract is executed, unless there is a change in the scope of work, whereby a modification to the Project Contract may be executed, or the government estimate contained a material error. In accordance with 23 CFR, Part 172.5(c), lump sum agreements are subject to a prenegotiation audit.

#### 8.1.6 Overhead

The maximum allowed overhead and burden for the GCA is 170% for environmental (including construction phase work), geotechnical, photogrammetry and survey; 150% for engineering design, architectural design, landscape design, planning, engineering studies and other transportation studies or services; and 120% for construction inspection, quality assurance inspection, and construction testing. The actual overhead and burden shall be determined by a final audit; however, payment shall not exceed the above percentages. In cases where the Department provides a significant portion of the Consultant's overhead by providing equipment, administrative support, etc., a lower overhead rate will be negotiated in the PC.

#### 8.1.7 Maximum Hourly Rate

The maximum allowed hourly rate is \$50.00 per hour for individuals of the firm up to an annual rate of \$104,000.00 for salary actually paid.

#### 8.1.8 Submission of Invoices

Invoices shall be submitted monthly by the Consultant to the Department's Project Manager, or his/her designee. Invoices shall be submitted in duplicate in a form acceptable to the Department, accompanied by one copy of a progress work chart. The progress work chart must (1) correspond to the invoice, (2) outline the work completed during that invoice period, and (3) document anticipated problems as well as possible solutions to those problems.

#### 8.1.9 Payment of Invoices

Payment for services shall be made monthly based upon the certified payroll for costs incurred during the previous month, plus reimbursement for out-of-pocket expenses. These progressive or "progress" payments shall include a proportionate amount of the fixed fee, if applicable. Payments should be made within 30 days.

#### 8.1.10 Semifinal Estimate

When 80% to 90% of the cost has been expended under the PC, the Consultant shall develop an estimate of the dollar amount and work hours necessary to complete the work, including an explanation of where and why any overruns are anticipated to occur. If the Department is satisfied that sufficient justification exists, a revised maximum amount may be approved.

#### 8.1.11 Final Payment

- a. Upon receipt by the Department of all required plans, reports and documents, the Consultant may voucher for total cost as defined in the Project Contract, less previous payments by the Department.
- b. Upon acceptance of all required deliverables and services, including but not limited to plans, reports, and documents, the Department shall pay the total cost as defined in the Project Contract, less previous payments to the Consultant, which payment shall constitute payment in full for all work performed under the Project Contract.
- c. In the event that the PC is terminated pursuant to Section 12 of these General Conditions, without the completion of the services as specified in said Project Contract, the total cost paid to Consultant shall constitute payment in full for the PC.
- d. In the event that a PC is terminated for reasons other than indicated in c above, without completion of the services as specified in the PC, the total cost of the work completed plus a percentage of the fixed fee proportional to the amount of work completed shall constitute payment in full for the PC.

#### 8.1.12 Maximum Amount Payable

The total estimated cost shall be stipulated in the Project Contract. The amount shall not be exceeded without a written contract modification between the Consultant and the Department. The work is to be completed as economically as possible and shall be subject to review by the Department. Modifications to GCA's and/or PC's must include a written justification and determination that the change was justifiable by the Department using the following levels of approval. Modifications up to 25% may be approved by a Project Manager; up to 50% by a Program Manager; up to 100% by the Bureau Director; and any modification that exceeds 100% must be approved by the Department's Chief Engineer.

#### 8.1.13 Payment Upon Termination.

In the event of any termination under Section 12 of these General Conditions, Consultant shall be entitled to invoice the Department and shall be paid in accordance with said section, through the effective date of termination.

#### 8.1.14 Records of Consultant's Costs

Records of Consultant's costs pertinent to Consultant's compensation under the GCA and/or PC shall be kept in accordance with generally accepted accounting practices. To the extent necessary to verify Consultant's charges and upon Department's timely request, copies of such records shall be made available to the Department. Records shall be available for review by the Department for a period of three (3) years following final payment.

#### 8.1.15 Project Records

The Consultant shall keep records in such form as may be easily audited and in accordance with 48 CFR, Part 31 - Contract Cost Principles and Procedures. The employee's salary record shall show time spent on the work. The Consultant agrees to keep the Department informed as to changes in rate and key personnel. The Department reserves the right to accept or reject the Consultant's assignment of personnel to this project.

#### 8.1.16 No Inflation Adjustments / Interest

No payments due the Consultant shall be adjusted for inflation. No interest shall be due or payable on any payment due the Consultant, except that the Department shall pay statutory interest on uncontested Final Payments for any period of time that extends beyond 60 Days of the date of receipt of all conforming Closeout Documentation. The preceding exception expressly does not include payments regarding pending issues, a dispute or claim.

#### 8.1.17 Amounts Due the Department

Unless expressly provided otherwise in the PC, in cases where the Department may deduct sums from amounts otherwise due the Consultant, and where the sums to be deducted are more than the funds otherwise due the Consultant, the Consultant shall remit all amounts due the Department such time as the Department and Consultant agree.

### SECTION 9 – ADDITIONAL SERVICES

#### Scope of Section

This Section contains general provisions related to changes in quantities, scope, time and payment.

#### 9.1 ADDITIONAL SERVICES

If a change deemed to be outside of the originally contemplated work as described under the Project Contract should be considered, the Consultant shall submit its proposal, including costs, in writing to the Department and shall receive approval in writing before proceeding with the extra work. Any work deemed to be outside that contemplated under the Project Contract which is performed without prior approval shall be the responsibility of the Consultant, and no claim may be made upon the Department for the costs of such unauthorized work. No changes are to be made in the General Consultant Agreement or Project Contract except in writing by both parties, and such agreed changes shall constitute a modified General Consultant Agreement and/or a modified Project Contract.

The Department shall pay Consultant for additional Services performed or furnished after both Department and Consultant agree that such services shall be performed or furnished at a compensation rate mutually agreed upon by Department and Consultant.

## SECTION 10 – INDEMNIFICATION AND INSURANCE

### Scope of Section

This Section contains general requirements for indemnification and insurance by the Consultant.

#### 10.1 INDEMNIFICATION

Consultant promises to indemnify and hold harmless the Department and its officers, agents and employees from any and all claims, damages, debts, demands, suits, actions, reasonable attorney fees, court costs, arbitration or other dispute resolution costs, expenses and any liabilities of every kind or nature attributable to, resulting from, or arising out of any negligent or intentional wrongful act, error, omission or breach of contract by the Consultant or subconsultant(s) in the performance and furnishing of services under the GCA and/or PC. The preceding sentence shall not constitute a waiver of any defense, immunity or limitation of liability that may be available to the Department, or its officers, agents or employees, under the Maine Tort Claims Act (Title 14 M.R.S.A. § 8101 et. seq.), and shall not constitute a waiver of other privileges or immunities that may be available to the Department. This indemnification provision shall survive any termination or expiration of the GCA and/or PC.

#### 10.2 INSURANCE

##### 10.2.1 Consultant Procured Insurance

All insurance coverage must be provided by an insurance company or companies licensed or approved to do business in the State of Maine by the Maine Bureau of Insurance. Consultant and subconsultant(s) shall pay all premiums and take all other actions necessary to keep required insurances in effect during such times as GCA and/or Project Contract obligations exist. Certificates of Insurance shall be provided to the Contracts Section upon execution of a GCA or stand-a-lone Project Contract and on an annual basis thereafter. The maximum deductible for any type of insurance required shall not exceed \$10,000.00. However, the Department, at the request of the Consultant, may increase the maximum deductible upon a showing of sufficient assets as determined by the Department. All requests for waivers shall be submitted to the Contracts Section, and all approved waivers shall be renewed on an annual basis.

##### 10.2.2 Additional Insureds

The Department shall be listed as an additional insured on Commercial General Liability and Railroad Protective Liability insurance policies carried by both the Consultant and subconsultant(s) that are applicable to the Project.

##### 10.2.3 Certificates of Insurance to Department

Consultant and subconsultant(s) shall deliver to Department signed, valid, and enforceable certificates of insurance proving the coverages required by this agreement. Such certificates shall be furnished prior to commencement of Consultant and/or subconsultant(s) services and whenever said policies are renewed thereafter during the period of the GCA and/or PC.

#### 10.2.4 Commercial General Liability Insurance

The Consultant and subconsultant(s) shall purchase and maintain a policy of Commercial General Liability or other coverage affording equal or greater protection as determined by the Department, in an amount not less than \$1,000,000 per occurrence and \$2,000,000 in the aggregate. Such policy shall include products and completed operations as well as contractual liability coverages.

When the work to be performed entails the use of barges, tug boats, work boats, supply boats, etc., Protection and Indemnity coverage shall be provided at the limits called for under Commercial General Liability insurance.

When the work to be performed is adjacent to a railroad, Railroad Protective Liability insurance shall be provided by the Consultant.

#### 10.2.5 Professional Liability

The Consultant and subconsultant(s) shall purchase and maintain a Professional Liability insurance policy for errors and omissions that provides minimum liability coverage of \$500,000.00 per claim and annual aggregate. This policy shall cover negligent acts, errors or omissions by the Consultant and subconsultant(s) engaged by consultant and other any person or entity for whom the Consultant is legally liable arising out of the rendition of services pursuant to the GCA and/or PC. The Department reserves the right to adjust liability coverage on a project-by-project basis as it deems appropriate.

#### 10.2.6 Automobile Liability

The Consultant and subconsultant(s) shall carry Automobile Liability insurance covering the operation of all motor vehicles including any which are rented, leased, borrowed or otherwise used in connection with the project. The limit of liability under this section shall be \$1,000,000 per occurrence.

#### 10.2.7 Workers' Compensation Insurance

Consultant and subconsultant(s) shall carry Workers' Compensation Insurance or shall qualify as a self-insurer with the State of Maine Workers' Compensation Board, all in accordance with the requirements of the laws of the State of Maine. When maritime exposures exist, coverage should be arranged to include United States Long Shore and Harbor Workers coverage.

#### 10.2.8 Claims

Each insurance policy shall include a provision requiring the insurer to investigate and defend all named insured's against any and all claims for death, bodily injury or property damage, even if groundless.

#### 10.2.9 Compliance

The Consultant shall be in compliance with this section provided that Consultant and subconsultant(s) (A) procures coverage under one policy of insurance covering all risks arising out of performance of the General Consultant Agreement and/or Project Contracts or (B) procures separate insurance policies to cover all risks arising out of performance of the General Consultant Agreement and/or Project Contract.

In either case, a Certificate of Insurance must be filed for each policy indicating that all required insurance has been obtained.

## SECTION 11 - RESOLUTION OF DISPUTES

### 11.1 GENERAL

To preserve any claim, the Consultant must first comply with and exhaust all provisions of this Section 11. Regardless of the status or disposition of any Dispute, the Consultant and the Department must perform their contractual responsibilities promptly and diligently.

### 11.2 NEGOTIATION WITH PROJECT MANAGER

The Consultant shall promptly notify the Project Manager, or his/her designee, of disputes that could significantly affect scope, schedule or compensation. After such notice, the Consultant and the Project Manager shall promptly negotiate in good faith to resolve the dispute. The Project Manager will promptly issue a decision.

### 11.3 RECONSIDERATION BY DIRECTOR

If the Consultant desires a review of the Project Manager's decision, then the Consultant shall promptly request in writing that the Department's Director of the applicable Bureau or Office reconsider the Project Manager's decision. The Director, or the Director's designee(s) shall promptly issue a written decision to the Consultant. The decision will affirm, reverse or amend the decision of the Project Manager.

### 11.4 APPEAL TO COMMISSIONER

To receive further review of the Director's decision, the Consultant must submit to the Commissioner a written appeal within 14 days of receiving the Director's decision. The appeal must include a description of the Dispute, the facts that demonstrate that the Consultant is entitled to the relief, and a request for specific relief.

Within 60 days of receiving the appeal, the Commissioner, or the Commissioner's designee, shall issue a written decision to the Consultant that affirms, reverses or amends the Director's decision. The Commissioner's decision shall constitute the Department's final interpretation of any relevant provisions in the General Consultant Agreement or in the Project Contract and shall be final agency action.

### 11.5 JUDICIAL REVIEW

The Consultant agrees that any judicial review of any claim arising from the General Consultant Agreement, Project Contract, or the Project must be commenced in the Superior Court of Maine, Kennebec County. Any petition for review must be in accordance with the Maine Administrative Procedure Act, 5 M.R.S.A. §11001, et seq. and Rule 80C of the Maine Rules of Civil Procedure.



## SECTION 12 – DEFAULT / TERMINATION / SUSPENSION

### Scope of Section

This Section contains general provisions related to default and termination of the GCA and/or PC.

#### 12.1 DEFAULT

##### 12.1.1 Grounds for Default

The Consultant is in default of the Project Contract if the Consultant:

- A. Fails to promptly begin the work under the Project Contract after being authorized to proceed;
- B. Fails to perform the work with sufficient labor, equipment, or materials to assure the timely completion of the work;
- C. Fails to meet standards of performance contained in Section 6;
- D. Discontinues the prosecution of the work without Departmental approval;
- F. Continues to perform work after the Department directs that work be stopped;
- G. Fails to resume work that has been suspended as required by the Project Contract;
- H. Becomes insolvent or is declared bankrupt or commits any act of bankruptcy or insolvency that could affect the work in any way;
- I. Allows any final judgment to stand against the Consultant unsatisfied for a period of ten (10) days;
- J. Makes an assignment for the benefit of creditors without authorization by the Department; or
- K. In any other manner, fails to perform the work in Substantial Conformity with any material provision of the GCA and/or PC.

##### 12.1.2 Notice of Default / Cure

Except as otherwise provided in these Consultant General Conditions, if default occurs, the Department may give written Notice of Default to the Consultant. Failure to give Notice of Default is in no way a waiver by the Department of any provision of the GCA and/or PC.

If the Consultant fails to completely cure such Default within a period of fourteen (14) days after Notice of Default, then the Department may (1) terminate the GCA and/or PC for cause in accordance with Section 12.2.1 of these General Conditions, or (2) take prosecution of the work away from the Consultant without violating the GCA and/or PC.

## 12.2 TERMINATION

The Department may, by written order to the Consultant, terminate the GCA and/or PC as provided in this section. Termination of the GCA and/or PC or portion thereof shall not relieve the Consultant of its contractual responsibilities for the work completed.

### 12.2.1 For Cause

If the Consultant fails to completely cure all defects identified in the Notice(s) of Default provided for in Section 12.1.2 within the fourteen (14) day cure period provided, the Department may immediately terminate the GCA and/or PC for cause by written Notice of Termination For Cause. In this event, the Department may use any or all Consultant products for the work and may enter into an agreement with another entity for the completion of the work, or use such other methods as in the opinion of the Department are required for the completion of the intent of the GCA and/or PC in an acceptable and timely manner.

The Department shall pay for all accepted items of work as of the date of termination at prices determined by the Department. The Consultant shall make all work records available to the Department upon request regarding payment under this section. All costs and charges incurred by the Department, together with the cost of completing the work specified in the GCA and/or PC, shall be deducted from amounts otherwise due the Consultant. If such expenses exceed the sum that would have been payable under the GCA and/or PC, then the Consultant is liable and shall pay to the Department the amount of such excess within 30 days of the delivery of a statement setting forth such expenses to the Consultant, as applicable.

If the Consultant files for bankruptcy at any time before expiration of the GCA and/or PC, then the Consultant agrees, if requested by the Department and within 30 days of such request, to take all actions necessary or convenient to reject or accept the GCA and/or PC under the executory contract provisions of the federal bankruptcy code. Upon termination for cause, the Department may, at its discretion, terminate the GCA and/or PC.

### 12.2.2 For Convenience

The Department may terminate the GCA and/or PC for convenience or for any reason that is in the best interest of the Department. Terminations caused without fault of or for reasons beyond the control of the Consultant are terminations for convenience. The Department shall notify the Consultant of such terminations by sending a Notice of Termination for Convenience.

In case of a Termination for Convenience, the Department shall pay for all accepted items of work as of the date of termination at agreed upon prices. The Consultant shall make all work records available to the Department upon request regarding payment under this section. Acceptable materials, obtained by the Consultant for the work but which have not been incorporated therein, may at the option of the Department be purchased from the Consultant at actual cost delivered to a prescribed location or otherwise disposed of as mutually agreed.

After receipt of Notice of Termination for Convenience from the Department, the Consultant may also submit a claim for additional damages or costs not covered above or elsewhere in the GCA and/or PC to the Project Manager within 60 sixty days of the effective termination date. Such claim may include such cost items as project investigative costs, overhead expenses attributable to the project terminated, legal

and accounting charges involved in claim preparation, subconsultant(s) costs not otherwise paid for, idle labor cost if work is stopped in advance of termination date, guaranteed payments for private land usage as part of the PC, and any other cost or damage item for which the Consultant reasonably believes reimbursement should be made. In no event, however, shall loss of anticipated profits be considered as part of any settlement.

The Department shall respond in writing to such claim within 60 days of receipt.

### 12.3 RIGHT TO SUSPEND WORK

The Department has the right to suspend any or all work at any time for any reason as it deems necessary. Consultant may receive payment for the portion of services completed through the date of suspension.

## SECTION 13 – ENTIRE AGREEMENT

### 13.1 CONTROLLING LAWS

The agreements and contracts referred to in these General Conditions are to be governed by the applicable laws of the Federal Government and the State of Maine. Listed below are some of the Federal and State controlling laws to be observed. This list is provided for reference only and should not be considered inclusive.

23 CFR Part 172, Administration of Engineering and Design Related Service Contracts  
41 USC 253 and 259, Brooks Act, P.L. 92-582  
5 M.R.S.A. §1743, Administrative Procedures and Services  
23 M.R.S.A. §4206, Department of Transportation, Duties of Commissioner

#### 13.1.1 Laws To Be Observed

The Consultant shall keep itself informed of and comply with all applicable federal and State laws, rules, regulations, orders, and decrees ("Law") affecting the work including all environmental, wage, labor, equal opportunity, safety, patent, copyright, or trademark laws. If required by Contract, the Consultant must also comply with applicable local law, ordinances, regulations in any manner affecting the conduct of work as defined by the scope of work. The Consultant shall indemnify the Department and hold the Department harmless against any and all claims or liabilities arising from or based upon the violation or alleged violation of any such Law caused directly or indirectly by or through the Consultant.

#### 13.1.2 Patents and Copyrights

Data, and publication rights to any documents, produced under the terms of a GCA and/or PC are reserved by the Department. The Consultant shall not copyright the material produced under the terms of the GCA and/or PC without written approval of the Department, except to the extent necessary to protect its rights pursuant to the following paragraph.

The parties to a GCA and/or PC mutually agree that, if patentable discoveries, intellectual property and software, or inventions should result from work described therein, all rights accruing from such discoveries or inventions shall be the sole property of the Consultant. However, the Consultant agrees to

and does hereby grant to the Department and the United States Government an irrevocable, nonexclusive, nontransferable, and royalty free license to use any such invention in the future on any project.

The Consultant shall indemnify and hold harmless the Department and any affected third party or political subdivision from all claims of infringement that arise from use of any patented or copyrighted items provided by the Consultant.

### 13.2 ENTIRE AGREEMENT / BINDING EFFECT / MODIFICATION / ASSIGNMENT

- A. Department and Consultant each is hereby bound and the partners, successors, executors, administrators and legal representatives of Department and Consultant (and to the extent permitted by the GCA, the assigns of Department and Consultant) are hereby bound to the other party to the GCA and/or PC and to the partners, successors, executors, administrators and legal representatives (and said assigns) of such other party, in respect of all covenants, agreements and obligations of the GCA and/or PC.
- B. Neither Department nor Consultant may assign, sublet, or transfer any rights under or interest (including, but without limitation, moneys that are due or may become due) in the GCA and/or PC without the written consent of the other, except to the extent that any assignment, subletting, or transfer is mandated or restricted by law. Unless specifically stated to the contrary in any written consent to an assignment, no assignment shall release or discharge the assignor from any duty or responsibility under the GCA and/or PC.
- C. Unless expressly provided otherwise in the GCA and/or PC:
  - 1. Nothing in the GCA and/or PC shall be construed to create, impose, or give rise to any duty owed by Department or Consultant to any Contractor, Contractor's subcontractor, subconsultant(s), supplier, other individual or entity for or employee of any of them.
  - 2. All duties and responsibilities undertaken pursuant to the GCA and/or PC shall be for the sole and exclusive benefit of Department and Consultant and not for the benefit of any other party. The Department agrees that the substance of the provisions of this Section 13.1 shall appear in the Contract Documents.

### 13.3 CONFLICT OF INTEREST

A person or entity entering into a GCA and/or PC may not have any financial or other interest, other than the performance of the GCA and/or PC, in the project or in its outcome. This prohibition includes, without limitation, (a) any agreement with, or other interest involving, third parties who have an interest in the outcome of the project that is the subject of the GCA and/or PC; (b) any agreement providing incentives or guarantees of future work on the project or related matters; and (c) any interest in real property acquired for the project unless such real property interest is openly disclosed to the Department before the person or entity entered into the PC.

- 1. This section prohibits all conflicts of interest both at the time the contracting party enters into a GCA and/or PC and during the life of a GCA and/or PC.

2. This section prohibits situations involving an actual conflict of interest and those creating an appearance of a conflict of interest. The Department may waive this prohibition or impose curative modifications on the scope of any GCA or PC between the person or entity and MEDOT to eliminate the conflict or the appearance of a conflict.
3. A consultant involved in the preparation of information that shall be used or considered in evaluations under the National Environmental Policy Act shall, by virtue of signing the GCA and/or PC, attest that Consultant (a) has no financial or other interest in, or commitment for, any future contract related to the design or construction of the project or any of its alternatives, (b) has no financial or other interest in said project or its alternatives, or any part thereof, and (c) has no other interest which, under applicable law, would prohibit the selection of said Consultant to prepare an Environmental Assessment, Environmental Impact Statement, or other environmental documents for the project.
4. All determinations made under this section shall be left at the sole discretion of the Department.

#### 13.3.4 NO WAIVER

If either party fails or refuses to enforce any provision in the GCA and/or PC, that shall not constitute a waiver of that provision, nor shall it affect the enforceability of that provision or of the remainder of the GCA and/or PC.

**APPENDIX A**

**NOTICE OF CONTRACTORS  
COMPLIANCE WITH TITLE VI OF THE CIVIL RIGHTS OF 1964  
FOR FEDERAL AID CONTRACTS**

During the performance of a General Consultant Agreement and/or Project Contract, the consultant, for itself its assignees and successors in interest (hereinafter referred to as the "Consultant") agrees as follows: (Please substitute the word "contractor" with "consultant".)

(1) Compliance with Regulations:

The contractor shall comply with the Regulations of the U.S. Department of Transportation relative to nondiscrimination in federally assisted programs of the U.S. Department of Transportation (Title 49, Code of Federal Regulations, Part 21 through Appendix H and Title 23, Code of Federal Regulations 710.405 (b), hereinafter referred to as the Regulations), which are herein incorporated by reference and made a part of this contract.

(2) Nondiscrimination:

The contractor, with regard to the work performed by it after award and prior to the completion of the contract work, shall not discriminate on the ground of race, color or national origin in the selection and retention of subcontractors, including procurements of materials and leases of equipment. The contractor shall not participate either directly or indirectly in the discrimination prohibited by Section 21.5 of the Regulations, including employment practices when the contract covers a program set forth in Appendix B of the Regulations.

(3) Solicitations for Subcontract, Including Procurements of Material and Equipment:

In all solicitations, either by competitive bidding or negotiation made by the contractor for work to be performed under a subcontract, including procurement of services, material or equipment, each potential subcontractor or supplier shall be notified by the contractor of the contractors obligations under this contract and the regulations relative to nondiscrimination on the ground of race, color, or national origin.

(4) Information and Reports:

The contractor shall provide all information and reports required by the regulations, or orders and instructions issued pursuant thereto, and shall permit access to its books, records, accounts, other sources of information, and its facilities as may be determined by the state highway agency or the Federal Highway Administration to be pertinent to ascertain compliance with such regulations, orders and instructions.

Where any information required of a contractor is in the exclusive possession of another who fails or refuses to furnish this information, the contractor shall so certify to the state highway agency or the Federal Highway Administration as appropriate, and shall set forth what efforts it has made to obtain the information.

(5) Sanctions for Noncompliance:

In the event of the contractor's noncompliance with the nondiscrimination provisions of this contract, the state highway agency shall impose such contract sanctions as it or the Federal Highway Administration may determine to be appropriate, including but not limited to:

- (a) withholding of payments to the contractor until the contractor complies and/or
- (b) cancellation, termination or suspension of the contract, in whole or in part.

(6) Incorporation of Provisions:

The contractor shall include the provisions of paragraph (1) through (6) in every subcontract, including procurements of materials and leases of equipment, unless exempt by the Regulations, order or instructions issued pursuant thereto. The contractor shall take action with respect to any subcontract or procurement as the state highway agency or the Federal Highway Administration may direct as a means of enforcing such provisions including sanctions for noncompliance. Provided, however, that in the event a contractor becomes involved in or is threatened with, litigation with a subcontractor or supplier as a result of such direction, the contractor may request the state to enter into such litigation to protect the interests of the state; and in addition, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

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**FEDERAL EEO AND CIVIL RIGHTS REQUIREMENTS**

Unless expressly otherwise provided in the Contract Documents, the provisions contained in this Section 2 of this "Federal Contract Provisions Supplement" are hereby incorporated into the Contract Documents.

**A. Nondiscrimination & Civil Rights - Title VI**

The Consultant and its subconsultants shall not discriminate on the basis of race, color, national origin, or sex in the performance of this Contract. The Consultant shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT assisted contracts. Failure by the Consultant to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the Department deems appropriate. The Consultant and subconsultants shall comply with Title VI of the Civil Rights Act of 1964, as amended, and with all State of Maine and other Federal Civil Rights laws.

For related provisions, see Subsection B - "Nondiscrimination and Affirmative Action - Executive Order 11246" of this Section 2 and Section 3 - Other Federal Requirements of this "Federal Contract Provisions Supplement" including section II - "Nondiscrimination" of the "Required Contract Provisions, Federal Aid Construction Contracts", FHWA-1273.

**B. Nondiscrimination and Affirmative Action - Executive Order 11246**

Pursuant to Executive Order 11246, which was issued by President Johnson in 1965 and amended in 1967 and 1978, this Contract provides as follows.

The Consultant shall take specific affirmative actions to ensure equal employment opportunity. The evaluation of the Consultant's compliance with these specifications shall be based upon its efforts to achieve maximum results from its actions. The Consultant shall document these efforts fully, and shall implement affirmative action steps at least as extensive as the following:

1. Ensure and maintain a working environment free of harassment, intimidations, and coercion at all sites, and in all facilities at which the Consultant's employees are assigned to work. The Consultant, where possible, shall assign two or more women to each construction project. The Consultant shall specifically ensure that all forepersons, superintendents, and other on-site supervisory personnel are aware of and carry out the Consultant's obligation to maintain such a working environment, with specific attention to minority or female individuals working at such sites or in such facilities.
2. Establish and maintain a current list of minority and female recruitment sources, provide written notification to minority and female recruitment sources and to community organizations when the Consultant or its union have employment opportunities available, and to maintain a record of the organization's responses.
3. Maintain a current file of the names, addresses and telephone numbers of each minority and female off-the-street applicant and minority or female referral from a union, a recruitment source or community organization and of what action was taken with respect to each such individual. If such individual was sent to the union hiring hall for referral and was not referred back to the Consultant by the union or, if referred, not employed by the Consultant, this shall be documented in the file with the reason therefore, along with whatever additional actions the Consultant may have taken.
4. Provide immediate written notification to the Department's Office of Human Resources – Equal Employment Opportunity when the union or unions with which the Consultant has a collective bargaining agreement has not referred to the Consultant a minority person or woman sent by the Consultant, or when the Consultant has other information that the union referral process has impeded the Design-Builder's efforts to meet its obligations.
5. Develop on-the-job training opportunities and/or participate in training programs for the area which expressly include minorities and women, including upgrading programs and apprenticeship and trainee programs relevant to the Consultant's employment needs, especially those programs funded or approved by the Department of Labor. The Consultant shall provide notice of these programs to the sources compiled under B above.
6. Disseminate the Consultant's EEO policy by providing notice of the policy to unions and training programs and requesting their cooperation in assisting the Consultant in meeting its EEO obligation; by including it in any policy manual and collective bargaining agreement; by publicizing it in the company newspaper, annual report, etc.; by specific review of the policy with all management personnel and with all minority and female employees at least once a year; and by posting the company EEO policy on bulletin boards accessible to all employees at each location where construction work is performed.
7. Review, at least annually, the company's EEO policy and affirmative action obligations under these specifications with all employees having any responsibility for hiring, assignment, layoff, termination, or other employment decisions including specific review of these items with on-site supervisory personnel such as Superintendents, General Forepersons, etc., prior to the initiation of construction work at any job site. A written record shall be made and maintained identifying the time and place of these meetings, persons attending, subject matter discussed, and disposition of the subject matter.
8. Disseminate the Consultant's EEO policy externally by including it in any advertising in the news media, specifically including minority and female news media, and providing written notification to and discussing the Consultant's EEO policy with other Consultant's and Subconsultants with whom the Consultant does or anticipates doing business.
9. Direct its recruitment efforts, both orally and written to minority, female and community organizations, to schools with minority and female students and to minority and female recruitment and training organizations serving the Consultant's recruitment area and employment needs. Not later than one month prior to the date for the acceptance of applications for apprenticeship or other training by any recruitment source, the Consultant shall send written notification to organizations such as the above describing the openings, screenings, procedures, and test to be used in the selection process.
10. Encourage present minority and female employees to recruit other minority persons and women and, where reasonable, provide after school, summer and vacation employment to minority and female youth, both on the site and in other areas of a Consultant's workforce.
11. Validate all tests and other selection requirements.
12. Conduct, at least annually, an inventory and evaluation at least of all minority and female personnel for promotional opportunities and encourage these employees to seek or to prepare for, through appropriate training, etc., such opportunities.



13. Ensure that seniority practices, job classifications, work assignments and other personnel practices, do not have a discriminatory effect by continually monitoring all personnel and employment related activities to ensure that the EEO policy and the Consultant's obligations under these specifications are being carried out.
14. Ensure that all facilities and company activities are non segregated except that separate or single-user toilet and necessary changing facilities shall be provided to assure privacy between the sexes.
15. Document and maintain a record of all solicitations of offers for subcontracts from minority and female construction Consultant's and suppliers, including circulation of solicitations to minority and female Consultant associations and other business associations.
16. Conduct a review, at least annually, of all supervisors' adherence to and performance under the Consultant's EEO policies and affirmative action obligations.

### **C. Disadvantaged Business Enterprise (DBE) Requirements**

The Department has established an annual Disadvantaged Business Enterprise aspirational goal to be achieved through race neutral means. This goal shall adjusted periodically and shall be provided by Supplemental Provision. Unless otherwise specifically provided in the Contract, there are no specific percentage requirements for use of DBEs for individual construction contracts.

The Consultant shall comply with all provisions of this section regarding DBE participation and the Department's latest version of the Disadvantaged Business Enterprise Program Manual, said Manual being incorporated herein by reference. In the case of conflict between this Contract and said Manual, this Contract shall control. The Department reserves the right to adjust DBE goals on a project-by-project basis by addendum.

#### **DBE Program Requirements**

Policy. It is the Department's policy that DBEs as defined in 23 CFR Part 26 revised April 2000, and referenced in the Transportation Equity Act for 21st Century of 1998, as amended from the Surface Transportation Uniform Relocation Assistance Act of 1987, and the Intermodal Surface Transportation Efficiency Act of 1991. The intent hereto remains to provide the maximum opportunity for DBEs to participate in the performance of contracts financed in whole or in part with federal funds.

The Department and its Con shall not discriminate on the basis of race, color, national origin, ancestry, sex, age, or disability in the award and performance of DOT assisted contracts.

Disadvantaged Business Enterprises are those so certified by the Maine Department of Transportation Office of Human Resources prior to bid opening date.

The Department has determined that elements of a good faith effort to meet the contract goal include but are not limited to the following:

1. Whether the Consultant advertised in general circulation, trade association, and minority/women's-focus media concerning the subcontracting opportunities;
2. Whether the Consultant provided written notice to a reasonable number of specific DBEs that their interest in the contract is being solicited;
3. Whether the Consultant followed up on initial solicitations of interest by contacting DBEs to determine with certainty whether the DBEs were interested;
4. Whether the Consultant selected portions of the work to be performed by DBEs in order to increase the likelihood of meeting the DBE goals;
5. Whether the Consultant provided interested DBEs with adequate information about the plans, specification and requirements of the contract;

6. Whether the Consultant negotiated in good faith with interested DBEs, not rejecting the DBE as unqualified without sound reasons based on a thorough investigation of their capabilities;
7. Whether the Consultant made efforts to assist interested DBEs with other appropriate technical/financial assistance required by the Department or Consultant;
8. Whether the Consultant effectively used the services of available minority/women's community organizations, minority/women's business assistance offices; and other organizations that provide assistance in the recruitment and placement of DBEs.

Substitutions of DBEs. The following may be acceptable reasons for Office of Human Resources approval of such a change order:

- The DBE defaults, voluntarily removes itself or is over-extended;
- The Department deletes portions of the work to be performed by the DBE.

It is not intended that the ability to negotiate a more advantageous contract with another certified DBE be considered a valid basis for such a change in DBE utilization once the DBE Bid Submission review has been passed. Any requests to alter the DBE commitment must be in writing and included with the change order.

Failure to carry out terms of this Standard Specification shall be treated as a violation of this contract and shall result in contract sanctions which may include withholding of partial payments totaling the creditable dollars amount which would have been paid for said DBE participation, termination of this contract or other measures which may affect the ability of the Consultant to obtain Department contracts.

Copies of the Maine Department of Transportation's DBE Program may be obtained from:

Maine Department of Transportation  
Office of Human Resources  
#16 State House Station  
Augusta, Maine 04333-0016  
tel. (207) 287-3551

Quarterly Reporting Requirement. The Consultant must submit quarterly reports of actual dollars paid to Disadvantaged Business Enterprises (DBE's) on this Project to the MEDOT Office of Human Resources by the end of the first week of January, April, July and October for the period covering the preceding three months considered Federal Fiscal Year quarters. The reports shall be submitted directly to the Office of Human Resources on the form provided in the latest version of the DBE Program Manual. Failure to submit the report by the deadline may result in a withholding of approval of partial payment estimates by the Department.

**APPENDIX B**

**POLICY ON REIMBURSEMENT OF CONSULTANT SALARY  
AND OVERHEAD COSTS**

August 31, 1993  
Revised: November 1, 1997  
May, 2002

Effective with contracts executed on or after November 1, 1997, it is the policy of the Maine Department of Transportation to establish the following maximum reimbursement levels for salary and overhead costs of consultant and subconsultant firms engaged to perform services for the Department.

**Salaries**

\$50 per hour for individuals of the firm up to an annual rate of \$104,000.00 for salaries actually paid.

**Overhead**

- a. Construction inspection and construction testing, including quality assurance inspection: 120% of direct labor base, or equivalent if different base is used by the consultant or subconsultant;
- b. Engineering design, architectural design, planning, engineering studies and other transportation studies or services: 150% on direct labor base, or equivalent if different base is used by the consultant or subconsultant, and;
- c. Environmental, geotechnical, photogrammetry and survey: 170% on direct labor base, or equivalent if different base is used by the consultant or subconsultant.

The Chief Engineer, assisted by the Director, Office of Audit, will periodically review the maximum reimbursement levels and recommend revisions to them when warranted.

**APPENDIX C**

**CONSULTANT CONTRACT FORMS**

- 1) General Consultant Agreement
- 2) Modification to General Consultant Agreement
- 3) Project Contract
- 4) Modification to Project Contract
- 5) Disclosure Form to Be Completed by All Corporations
- 6) MEDOT DBE Proposed Utilization Form
- 7) MEDOT DBE Quarterly Reporting Form
- 8) MEDOT Consultant Evaluation Form & Instructions